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# "What's in a Name?": An Attempt To Resolve the "Analytic Ambiguity" of the Designated and Limited Public Fora

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# Comments

# "What's in a Name?": An Attempt To Resolve the "Analytic Ambiguity" of the Designated and Limited Public Fora

Ronnie J. Fischer*

## I. Introduction

*What signifies knowing the Names,*
*if you know not the Natures of Things?*[1]

Traditional public forum. Designated public forum. Limited public forum. Nonpublic forum. A first-time student of the public forum doctrine might look at these otherwise unassuming words and offhandedly ask: "What's in a name?"[2] Much, it turns out. Often the entire outcome of a public forum doctrine case depends on it.[3] As

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1. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1750).

2. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 1 (William Lyon Phelps ed., Yale Univ. Press 1923).

3. This is because courts attach to these names particular levels of constitutional review, which leads to fairly predictable outcomes. *See infra* text accompanying notes 9-

important as these names are, however, even public forum doctrine veterans disagree on the exact natures of these names.[4] The words hardly explain themselves, and can easily mislead interpreters.[5] Nowhere is this confusion greater than in the case of the intermediate categories of public fora, where both the natures[6] and even the names[7] of these categories are anything but certain.

Unlike the shape of a rose,[8] the contours of the intermediate categories of public fora remain indistinct, frustrating attempts to define consistently these fluid, abstract principles. That which one court calls a "limited public forum" might by some other, or the same, name represent a contradictory collection of ideas in a different jurisdiction,[9] or even in the same jurisdiction.[10] This gives rise to one of the principal paradoxes in First Amendment jurisprudence: the names of the categories of public fora are of preeminent importance; yet, neither judges[11] nor attorneys[12]

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4. *See, e.g.*, Naturist Soc'y, Inc. v. Fillyaw, 958 F.2d 1515, 1524 (11th Cir. 1992) (Clark, J., dissenting) ("In this First Amendment free speech case we find ourselves in a quandary over labels: public forum, limited public forum, or non-public forum."); *see also infra* text accompanying notes 11-12.

5. In some jurisdictions, for example, to qualify as a "limited public forum" a location must be open to indiscriminate use by the general public—and thus is not in fact "limited" at all—while a "nonpublic forum" is not a private forum. *See* Estiverne v. La. State Bar Ass'n, 863 F.2d 371, 378 (5th Cir. 1989) (commenting on "the misleading nature" of the labels applied to different types of fora).

6. For example, one Second Circuit judge believes that, to qualify as a limited public forum, a location must be open to the public at large. Fighting Finest v. Bratton, 95 F.3d 224, 230 n.5 (2d Cir. 1996). Another judge on the Second Circuit, however, believes that a limited public forum may be open to less than the entire populace. *Id.* at 230 n.6.

7. *See, e.g.*, Ethredge v. Hail, 56 F.3d 1324, 1326-27 (11th Cir. 1992) (referring to the intermediate category as the "created public forum"); *see also* United States v. Albertini, 710 F.2d 1410, 1415-16 (9th Cir. 1983) (referring to the intermediate category as the "temporary public forum"), *rev'd*, 472 U.S. 675 (1985).

8. The famed accompanying sentence of the quote cited previously, *see supra* note 2, reads: "That which we call a rose / By any other name would smell as sweet." SHAKESPEARE, *supra* note 2, act 2, sc. 1.

9. *Compare* M.N.C. of Hinesville, Inc. v. United States Dep't of Def., 791 F.2d 1466, 1472 (11th Cir. 1986) (stating that the designated and limited public fora are interchangeable and that they both receive strict scrutiny review), *with* Gentala v. City of Tucson, 213 F.3d 1055, 1062 (9th Cir. 2000) (stating that the nonpublic and limited public fora are interchangeable and that they both receive rational basis review).

10. The Second Circuit, for example, has said, at different times, that the limited public forum is the same as the designated public forum and that the limited public forum is a subset of the designated public forum. *Compare* Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 211 (2d Cir. 1997) (stating that the designated and limited public fora are interchangeable), *with* Travis v. Owego-Appalachian Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991) (stating that the limited public forum is a subset of the designated public forum).

11. *See, e.g.*, Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266, 269-70 (9th Cir. 1995) (stating, in the span of one page, that limited public fora are governed by the same

can seem to agree upon what the intermediate categories should be called or how they should be differentiated from the other categories of public fora. As a result of the confusion among the categories, courts may classify the same or similar locations under different names, and because particular—if sometimes differing—standards of review are attached to these names, these courts may reach contrary results.[13]

According to standard public forum doctrine analysis,[14] a court must first decide that a particular form of suppressed expression qualifies as "protected expression" under the First Amendment, and that the suppression is occurring at the hands of a "state actor."[15] The court must then decide to which of the categories of public fora the property to which access is being sought belongs.[16] This categorization will in turn determine the type of review the state actor's suppressive conduct will receive.[17] Under the current all-or-nothing analysis of the United States Supreme Court, this review is limited to either strict scrutiny[18] or rational

standard as traditional public fora—strict scrutiny—and that limited public fora are indistinguishable from nonpublic fora—with both receiving rational basis review).

12. *See, e.g.*, Gen. Media Communications, Inc. v. Cohen, 131 F.3d 273, 279 n.7 (2d Cir. 1997) (stating that it was unclear whether appellees were trying to use the term "limited public forum" as a sub-category of the designated public forum, or whether they were trying to implicate a "designated public forum"); *see also* Summum v. Callaghan, 130 F.3d 906, 914 (10th Cir. 1997) (remarking that it was unclear whether plaintiff's use of the term "limited public forum" referred to a designated public forum or a nonpublic forum).

13. *Compare* Kincaid v. Gibson, 236 F.3d 342, 354-55 (6th Cir. 2001) (finding that a Kentucky State University yearbook constituted a limited public forum subject to strict scrutiny review and reversing the district court's summary judgment in favor of the University), *with* Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991) (finding a school yearbook to be a nonpublic forum and concluding that the school district did not violate a family planning program's First Amendment rights by refusing to publish its advertisements).

14. The public forum doctrine has had its fair share of critics over the years, including most recently Justice O'Connor in her "swing opinion" in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), in which she advocated a more flexible standard that would employ a sliding-scale approach to balance the benefits and costs of free speech in each particular setting. *See also* Chicago Acorn v. Metro. Pier & Exposition Auth., 150 F.3d 695, 703 (7th Cir. 1998). Despite some dissatisfaction with the public forum doctrine, however, a court has yet to deviate from this set of guidelines, which has become entrenched in First Amendment jurisprudence.

15. United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 348-49 (6th Cir. 1998).

16. *See id.*

17. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (stating that the nature of the property at issue determines the level of constitutional scrutiny to be applied).

18. *See, e.g.*, Kincaid v. Gibson, 236 F.3d 342, 348 (6th Cir. 2001) (stating that traditional, designated, and limited public fora receive strict scrutiny review, while nonpublic fora receive rational basis review).

basis.[19] The type of review that the government's conduct receives will almost always determine the outcome of the case. Few state actors have passed the strict scrutiny test in First Amendment cases;[20] in contrast, few have failed the rational basis test.[21]

Thus, the categorization of the property at issue is of utmost importance in First Amendment cases. Yet, despite its significance, the process of categorizing government property has become riddled with ambiguity. Most of this confusion centers around the existence of a middle category located somewhere between public fora and nonpublic fora. Although the majority of courts have accepted that at least one middle category does exist,[22] there is great confusion over the nature of this category and its relationship to the other categories.[23]

Courts have developed two alternatives for a middle category: the designated public forum[24] and the limited public forum.[25] Some courts do not distinguish between a designated and a limited public forum, and apply strict scrutiny to either.[26] Other courts locate the limited public

19. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (stating that limited public fora and nonpublic fora receive rational basis review, while traditional public fora receive strict scrutiny review).

20. *See, e.g.*, Deida v. City of Milwaukee, 176 F. Supp. 2d 859, 864 (E.D. Wis. 2001) (commenting that strict scrutiny is "the most exacting standard of review" and that any ordinances analyzed under it are "much less likely" to survive a First Amendment challenge than those analyzed under a more forgiving standard). *But see* Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1144 (8th Cir. 1996) (agreeing, for purposes of an emergency petition for injunctive relief, that Iowa Public Television had a compelling interest in limiting access to newsworthy candidates, that its methods were narrowly tailored, and that it had left open substantial access to other fora).

21. *See, e.g.*, DeNooyer v. Livonia Pub. Sch., 799 F. Supp. 744, 750-51 (E.D. Mich. 1992) (finding that school had a rational reason for refusing to allow a second-grade student to show a videotape of herself singing a song at a local church).

22. Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 345 (5th Cir. 2001) (stating that the acceptance of a middle category is widely accepted).

23. The confusion surrounding the designated and limited public fora has grown into such an impasse that it has become routine for any court discussing a public forum case to meditate on the confusion in its opinion. *See* Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) (commenting that "[t]he designated public forum has been the source of much confusion"); DeBoer v. Vill. of Oak Park, 267 F.3d 558 (7th Cir. 2001) (meditating on the "analytic ambiguity" of the public forum doctrine); Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 345-46 (5th Cir. 2001) (same); Fighting Finest v. Bratton, 95 F.3d 224, 225-28 (2d Cir. 1996) (commenting on the Supreme Court's "mixed signals" as to the criteria for establishing a limited public forum); Nat'l Ass'n of Soc. Workers v. Harwood, 874 F. Supp. 530, 532 (D.R.I. 1995) (commenting on the "murky status" of the public forum doctrine).

24. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (labeling explicitly the intermediate category of public forum the "designated public forum").

25. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (referring to the intermediate category as the "limited public forum").

26. *See, e.g.*, Kincaid v. Gibson, 236 F.3d 342, 348 (6th Cir. 2001).

forum as a subset of the designated public forum, and also apply strict scrutiny to both.[27] Still other courts locate the limited public forum as a subset of the nonpublic forum, and apply only rational basis to both.[28]

Part II of this comment will present a brief historical overview of the public forum doctrine, with an emphasis on the formation (and formulation) of the designated and limited public fora. Parts III and IV will examine the varying ways in which courts have interpreted the terms "designated public forum" and "limited public forum," looking first at relevant United States Supreme Court cases and then at recent circuit court interpretations of these decisions, respectively.

Part V of this comment proposes a new solution to the problem of the public forum doctrine's various forum names and meanings by suggesting that courts first recognize designated and limited public fora as discrete categories. Under this proposal, courts would combine, and expand upon, the paths already taken by the Second and Fourth Circuits, which apply not one but two levels of review to limited public fora.[29] This bifurcated analysis would reflect the ways in which limited public fora may be seen as both designated public fora and nonpublic fora, depending on the position of the speaker in relation to the established class. These standards of review should be based on whether the excluded speaker falls within the class for which the forum has been established. If the speaker falls within the class, a strict scrutiny standard of review should apply. However, if the speaker does not fall within the class, only a rational basis standard should apply. To ensure that government does not try to limit the class in an unfairly narrow manner, if the court initially determines that the excluded speaker falls outside of the class, the court should subject the government's designation of the class to its own rational basis review to ensure that government acted reasonably in limiting the class.[30]

## II. "The Problems of Speech in Public Places": A Brief History of the Public Forum Doctrine

The First Amendment to the United States Constitution broadly directs that "Congress shall make no law . . . abridging the freedom of speech."[31] While this may appear to guarantee all Americans absolute freedom of speech at all times, this freedom is, in fact, qualified.[32] Only

27. *See, e.g.*, Crowder v. Hous. Auth., 990 F.2d 586, 591 (11th Cir. 1993).

28. *See, e.g.*, DeBoer v. Vill. of Oak Park, 267 F.3d 558, 575 (7th Cir. 2001).

29. *See, e.g.*, Warren v. Fairfax County, 196 F.3d 186, 188 (4th Cir. 1999) (en banc); Fighting Finest v. Bratton, 95 F.3d 224, 225-28 (2d Cir. 1996).

30. *See Warren*, 196 F.3d at 194.

31. U.S. CONST. amend. I.

32. Poulos v. New Hampshire, 345 U.S. 395, 405 (1953) (stating that First

speech that the Court has determined to be "protected expression" may not be abridged.[33] Thus, one cannot, for example, yell "Fire!" in a crowded theater, as such "words of incitement" do not qualify as "protected expression."[34] Similarly, the Court has declared obscenity,[35] child pornography,[36] "fighting words,"[37] libel,[38] and certain "vulgar, offensive or shocking" material[39] to be unprotected forms of expression.

The reach of the First Amendment also depends on the status of the actor attempting to abridge protected expression, because the First Amendment applies only to governmental entities.[40] Thus, one cannot commandeer the house or backyard of a private landowner, who has the right to exclude others based solely on what they say.[41] A more difficult question is raised when the access being sought is to property owned or regulated by government. On one hand, an articulated goal of the First Amendment is to assure that those individuals who may not be able to afford other expressive outlets have a place to express their beliefs,[42] facilitating political and societal changes through peaceful and lawful means.[43] On the other hand, courts recognize that not all government property is created equal. Some government properties serve purposes other than public discussion,[44] such as delivering mail[45] or transporting individuals from one place to another. Such non-expressive purposes could easily be interrupted if expressive activity was permitted at these locales. No one would likely think it proper, for example, to allow a

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Amendment principles are not to be treated as a promise that everyone may go to a public place at any time and express their opinions).

33. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (recognizing that certain speech is beyond the bounds of the First Amendment and therefore constitutes "unprotected" expression). A reviewing court must also determine that the actions subject to regulation constitute "expression" rather than "conduct," because conduct may be regulated or prohibited without being subject to First Amendment issues. Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring) (stating that standing, patrolling, or marching on streets constitutes conduct, not speech, and as such may be regulated or prohibited).

34. Brandenburg v. Ohio, 395 U.S. 444 (1969).

35. Roth v. United States, 354 U.S. 476, 485 (1967); *see also* Miller v. California, 413 U.S. 15 (1973).

36. New York v. Ferber, 458 U.S. 747, 764 (1982).

37. *Chaplinsky*, 315 U.S. at 572.

38. Beauharnais v. Illinois, 343 U.S. 250 (1952).

39. FCC v. Pacifica Found., 438 U.S. 726, 747 (1978).

40. Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 280 (1984).

41. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972).

42. Martin v. Struthers, 319 U.S. 141, 146 (1943).

43. Carey v. Brown, 447 U.S. 455, 467 (1980).

44. *See* Adderley v. Florida, 358 U.S. 39, 54 (1966) (Douglas, J., dissenting).

45. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) (finding that mailbox did not constitute a public forum because it is primarily involved in the delivery of mail).

rock concert in the reading room of a public library, or an anti-war protest on the grounds of Arlington Cemetery, because the essence of both locations is a quiet atmosphere.[46]

Assuming that both protected expression and state action are involved, "the problems of speech in public places"[47] have come to be controlled by the public forum doctrine. This doctrine has evolved to take a categorical approach to answering such questions.[48] The category of property, once established, dictates the level of review the Court will give the denial of expression,[49] and, in practice, will determine the outcome of the case. If one seeks access to a parcel of property categorized as a "traditional public forum" or "designated public forum," the individual will likely be successful.[50] If, on the other hand, one seeks access to a piece of property that the reviewing court designates as a "nonpublic forum," the individual will be unlikely to obtain that access.[51]

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46. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). The state may have additional interests in propagating reasonable time, place, and manner restrictions. For example, two parades cannot march on the same street at the same time, Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding local ordinance forbidding unlicensed street parades as a reasonable time, place, and manner restriction), and holding a parade on a large street during rush hour might intolerably burden a city's flow of traffic. Thus, government may enact a reasonable regulation restricting the hours at which groups may demonstrate or hold parades on the city's streets. Cox v. Louisiana, 379 U.S. 536, 554 (1965). At the same time, government may prohibit parades altogether from a place like the Pennsylvania Turnpike. Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth., 691 F.2d 155, 161 (3d Cir. 1982) (dicta) (stating that government could prohibit parades on the Pennsylvania Turnpike).

47. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12.

48. *See, e.g.*, Leventhal v. Vista Unified Sch. Dist., 973 F. Supp. 951, 956 (S.D. Cal. 1997) (stating that "the modern categorical approach" to public forum analysis began with *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)). Courts have generalized the public forum's categorical methodology even further by looking at the abstract properties of the particular type of public forum in general. *See* Greer v. Spock, 424 U.S. 828 (1976) (inquiring into the abstract properties of military installations in general rather than the particular military installation at issue in the case).

49. *See, e.g.*, Toward Gayer Bicentennial Comms. v. R.I. Bicentennial Found., 717 F. Supp. 632, 637 (D.R.I. 1976) (stating that "the key" to plaintiff's case is which category of public forum the location in question constituted).

50. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (stating that the nature of the property determines the level of constitutional scrutiny to be applied); *see also* United States v. Frandsen, 212 F.3d 1231, 1238, 1240 (11th Cir. 2000) (classifying a national park as a traditional public forum and striking down the government's permit scheme); United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998) (finding a state agency created a designated public forum and failed to show a compelling reason for excluding plaintiff's controversial advertisement).

51. *See, e.g.*, Calash v. City of Bridgeport, 788 F.2d 80, 82, 84 (2d Cir. 1986) (declaring Kennedy Stadium to be a nonpublic forum and finding the government's exclusion of rock music reasonable).

Although the outcomes in cases involving traditional, designated, and nonpublic fora are relatively predictable, the outcomes in cases involving locations categorized as limited public fora are in a state of confusing disequilibrium. In the fewer cases in which a forum is categorized as a "limited public forum," the success of one seeking access to such a location depends on the reviewing court's interpretation of the "limited public forum" category.[52] Thus, the deciding factor in public forum cases is not what one says or even where one says it, but the classification method used by the court.

### *A. Open Spaces vs. Public Places: Early Analyses of Public Expression and Traditional Concepts of Property Law*

The roots of the public forum doctrine can be found in early attempts by courts to protect speech in general, regardless of where the attempt at expression took place. Before the Court held freedom of speech to be a right of personal liberty secured through the Fourteenth Amendment,[53] government could abridge an individual's right to speak on government property just as a private owner could.[54] Courts reached this conclusion by applying traditional principles of property law, analogizing a government proprietor to a private landowner.[55]

After the First Amendment was held applicable to the states through the Fourteenth Amendment,[56] this analogy no longer carried the day.[57] In *Hague v. CIO*,[58] Justice Roberts, speaking for a three-Justice plurality, rejected the municipality's argument that it owned the streets and parks within its bounds and could exclude anyone it wanted as a private owner could.[59] Justice Roberts relied on other principles of property law to

52. *Compare* Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (finding Kentucky State University yearbook to be a limited public forum and determining that the University's confiscation of yearbooks failed to pass strict scrutiny review), *with* Campbell v. St. Tammany Parish Sch. Bd., 231 F.3d 937 (5th Cir. 2000) (denying plaintiff's petition for rehearing on ground that defendant school board created a limited public forum but reasonably excluded religious services and partisan political activities from the school).

53. Gitlow v. New York, 268 U.S. 652, 666 (1925).

54. Davis v. Massachusetts, 167 U.S. 43 (1897).

55. *See id.* (upholding Boston preacher's conviction for sermonizing in the Boston Common without a permit because municipality owned the Common and as such could control access to the park as it wished).

56. *See Gitlow*, 268 U.S. at 666.

57. Hague v. CIO, 307 U.S. 496 (1939). Although this analogy may no longer control public forum analysis, it nonetheless still carries some force, and courts continue to refer to this principle in public forum doctrine cases. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 836-37 (1976) (stating that the state, no less than a private property owner, has the power to restrict speech on its grounds).

58. 307 U.S. 496 (1939).

59. *Id.* at 514-15.

determine (albeit in dictum) that streets and parks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[60] According to Justice Roberts, such use of the streets and public parks was a part of the privileges, immunities, rights, and liberties of citizens "from ancient times."[61]

Years later, in 1965, Professor Harry Kalven officially put a name to the concept expressed in Justice Roberts's dictum.[62] While addressing what he referred to as "the problems of speech in public places," Professor Kalven identified streets, parks and other public places as "public forums" that citizens should be able to commandeer for public discussion.[63]

### *B. The Background to the Development of the Limited Public Forum: Selective Exclusions and the Rise of Equal Protection Claims*

*Hague* typified early public forum doctrine cases in that it involved an ordinance that prohibited anyone from engaging in expressive activity in a particular locale.[64] Eventually, however, cases arose involving ordinances that prohibited some individuals from engaging in expressive conduct but allowed other individuals to engage in the same conduct.[65] These cases involving selective exclusions inevitably led to claims under the Equal Protection Clause of the Fourteenth Amendment.[66] Equal Protection claims are closely intertwined with both First Amendment claims in general[67] and limited public forum claims in particular, as both tend to involve cases in which some individuals are permitted to engage

60. *Id.*

61. *Id.* at 515.

62. Kalven, *supra* note 47, at 12.

63. *Id.*

64. The ordinance in *Hague*, for example, prohibited anyone from holding a public meeting in the street or any other public place without first obtaining a permit. *Hague*, 307 U.S. at 503.

65. One early case, for example, involved a group of Jehovah's Witnesses' unsuccessful attempts to hold a religious meeting in a public park. Other groups, however, were permitted to conduct religious services in the same park. Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (invalidating the municipal ordinance in question on Fourteenth Amendment grounds).

66. The Equal Protection Clause commands that no state shall deny to any person within its jurisdiction equal protection of the law. U.S. CONST. amend. XIV. The effect of the Equal Protection Clause is to assure that similarly situated individuals are treated similarly. *E.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

67. *Mosley*, 408 U.S. at 95 (stating that government action permitting some individuals to speak but denying the opportunity to others raises an Equal Protection claim that is closely related to First Amendment interests).

in free expression while others are not.[68] The most influential of these cases has been *Police Department v. Mosley*.[69]

*Mosley* involved a Chicago ordinance that prohibited picketing or demonstrating "on a public way" within 150 feet of any school building while school was in session, with an exception for peaceful picketing of a school involved in a labor dispute.[70] The Court analyzed the ordinance in light of the Equal Protection Clause, as the ordinance effectively treated some picketing differently from others.[71] The Court stated that, once government opens a forum to some groups, it may not prohibit other individuals or groups from expressing themselves in the same forum on the basis of what the individuals intend to say.[72] Only if Chicago found that other picketing was specifically more disruptive than peaceful labor picketing would the city be able to restrict such picketing.[73] The Court found the Chicago ordinance to be unconstitutional because it was a content-based exclusion, which "is never permitted."[74]

### C. *The Birth of the "Designated Public Forum" and "Limited Public Forum" Doctrines*

*Mosley* and other dual Equal Protection-First Amendment cases established that government officials may not discriminate against a particular individual or group based on the officials' personal feelings toward either the group or their expressive activity.[75] Still to be addressed was whether government could limit the expressive activity in a forum based on more rational criteria.[76] As the Court struggled with the answer to this question it stumbled upon the concept of the limited public forum.

Courts originally conceived of what would become the limited

68. Selective exclusions often form the basis for Equal Protection claims because such exclusions suggest that government is treating similarly situated individuals differently by virtue of their exclusion. *See, e.g., id.* At the same time, the fact that some people are allowed to speak and others are not suggests that government may have created a limited public forum, since a certain group of individuals is allowed to engage in expressive activity.

69. 408 U.S. 92 (1972).

70. *Id.* at 94.

71. That is, by allowing peaceful picketing of a school involved in a labor dispute but not allowing any other type of picketing. *Id.* at 94-95.

72. *Id.* at 96.

73. *Id.* at 100.

74. *Id.*

75. United Mine Workers of Am. Int'l Union v. Parsons, 305 S.E.2d 343, 349-50 (W. Va. 1983) (citing *Mosley*, 408 U.S. at 96).

76. That is, other than by propagating reasonable time, place, and manner restrictions. *See supra* note 46 and accompanying text.

public forum in terms of the "transformation principle."[77] According to this principle, government, through some affirmative action, could "transform" a nonpublic forum into something more.[78] This "something more" would nonetheless still be something less than a full-fledged traditional public forum because it would not be required to be open indiscriminately to everyone.

The Supreme Court developed the transformation principle in 1981 in *Widmar v. Vincent*.[79] The selective exclusion at issue in *Widmar* dealt with a forum that the state university had opened to all other registered student groups except an organization of evangelical Christian students.[80] In dicta, the *Widmar* Court noted that a state may not selectively exclude individuals or groups from a forum that it had opened generally to the public.[81] This rule applies even when government opens its forum to the public by choice rather than by order.[82]

In stating this rule, the *Widmar* Court hinted at the possibility of a third public forum, a middle category somewhere between a traditional public forum and a nonpublic forum.[83] The facts of the case lent themselves to the formulation of such a rule, as the Court categorized the university at issue in the case as a forum distinctly unlike a traditional public forum.[84] In performing the appropriate public forum analysis, the Court categorized the attempted exclusion as a content-based restriction on speech, and as such subjected it to a strict scrutiny test.[85] Not being able to locate an appropriate justification for this exclusion, the Court struck down the university's policy.[86]

### *D.* Perry*'s Tripartite Delineation of the Categories of Public Fora*

In the same line as *Widmar* came *Perry Education Association v. Perry Local Educators' Association*,[87] another case involving selective exclusion school property. Unlike *Widmar*, *Perry* involved a public school system in Indiana that opened up its interschool mail system to Perry Education Association (PEA), recently elected as the exclusive

77. Pfeifer v. City of West Allis, 91 F. Supp. 2d 1253, 1259-60 (E.D. Wis. 2000).
78. *Id.* at 1260.
79. 454 U.S. 263 (1981).
80. *Id.* at 264-65.
81. *Id.* at 267-68.
82. *Id.*
83. *Id.*
84. *Id.* at 268 (stating that a university represents a more unique public forum because its mission is education for its students).
85. *Id.* at 270.
86. *Id.*
87. 460 U.S. 37 (1983).

bargaining representative of the school district's teachers.[88] The school district also allowed local parochial schools, church groups, the YMCA, and the Cub Scouts to use its mail system.[89] PLEA was not, however, prevented from using other school facilities, such as bulletin boards or the school announcement system, to communicate with teachers.[90]

Without much ado or explanation, the *Perry* Court set out the three main categories that today control public forum doctrine analysis.[91] As the first category the Court named the traditional public forum, which it defined as a public place that had been devoted to assembly and debate by either "long tradition or government fiat."[92] Within this category the Court delineated a spectrum of "public forumness," with the "quintessential public forums" described in *Hague*—primarily public parks and streets[93]—on the far end.[94]

The Court further differentiated between two kinds of restrictions within public fora in general: content-based exclusions and content-neutral exclusions.[95] The Court stated that the former type of restriction should receive strict scrutiny, meaning that the regulation will be upheld only when government can show that it is narrowly tailored to serve a compelling state interest.[96] In addition, the state may enact "reasonable" content-neutral time, place, and manner restrictions.[97] For such a restriction to be valid, government must show that it is necessary to serve a substantial state interest, that it is narrowly tailored to achieve that

88. *Id.* at 39.

89. *Id.* at 39 n.2.

90. *Id.* at 39-40.

91. *See, e.g.*, United States v. Gilbert, 920 F.2d 878, 884 (11th Cir. 1991) (stating that the Supreme Court in *Perry* set out the framework for analyzing First Amendment challenges to governmental regulation).

92. *Perry*, 460 U.S. at 45.

93. *Id.*

94. Although the traditional public forum category has been generally limited to public parks and streets, it has also been found to include state capitol grounds, Lederman v. United States, 131 F. Supp. 2d 46, 51-52 (D.D.C. 2001), the United States Supreme Court sidewalk, United States v. Grace, 461 U.S. 171, 180 (1983), public thoroughfares in National and Dulles Airports, U.S. Southwest Afr./Namib. Trade & Cultural Council v. United States, 708 F.2d 760, 774 (D.C. Cir. 1983); *but see* Jacobsen v. City of Rapid City, 128 F.3d 660, 664 (8th Cir. 1997), and national parks, United States v. Frandsen, 212 F.3d 1231, 1237 (11th Cir. 2000) (involving government concession that national parks constituted traditional public fora).

95. *Perry*, 460 U.S. at 45. Thus, when a restriction is found to be content-based, the classification of the location as a traditional, designated, limited, or nonpublic forum will be irrelevant to the outcome of the case.

96. *Id.* This accords with Equal Protection analysis, which mandates that, when government regulation discriminates among speech-related activities in a public forum, the legislation must be "finely tailored" to serve a substantial state interest, and the justifications offered for any distinctions must be carefully scrutinized. Carey v. Brown, 447 U.S. 455, 461-62 (1980).

97. *Perry*, 460 U.S. at 45.

interest, and that ample alternative channels of communication remain open.[98]

At the other end of the spectrum the Court described those types of public property that were neither by tradition nor by designation open to the public for communication.[99] This second type of forum became known as the nonpublic forum, an unfortunate misnomer because the designation of a forum as "nonpublic" does not mean that it is private, only that it has not been opened to the public in the reviewing court's eyes.[100] The *Perry* Court gave as the appropriate level of review for cases involving nonpublic fora the rational basis test, if the exclusion is not viewpoint- or content-based.[101] As part of its rationale, the Court once again revived the proposition that the state may regulate property it owns no less than a private landowner.[102] The Court further reasoned that implicit in the concept of a nonpublic forum is the right to exclude on the basis of either speaker identity or intended subject matter.[103]

Somewhere between these two extremes the Court located a middle ground. As the third and final category the Court recognized the existence of the intermediate category hinted at in *Widmar*.[104] Without actually describing or naming it, the Court explained that this category consisted of public property that the State has opened for use by the public in general as a place for expressive activity.[105] The Court noted that a state might not be required to open a forum to the public,[106] but that, once it did so, it would be bound by the same strict scrutiny analysis as the traditional public forum.[107]

The Court never gave a name to this middle category of forum. However, the Court's reference to "public property that is not by tradition or designation a forum for public communication,"[108] gave rise by negative implication to the middle category being called the

98. *Id.*; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (stating that the government's regulation must be narrowly tailored to serve the government's legitimate, content-neutral interests—but need not be the least restrictive means available—and must leave open ample channels of communication).

99. *Perry*, 460 U.S. at 46.

100. *See, e.g.*, Johnson v. City of Fort Wayne, 91 F.3d 922, 941 (7th Cir. 1996).

101. *Perry*, 460 U.S. at 46. Viewpoint- and content-based discrimination receive strict scrutiny review. *Id.* at 45.

102. *Id.* (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981)).

103. *Id.* at 49.

104. *Id.*

105. *Id.*

106. This is unlike traditional public fora, such as streets and parks, which are required to be opened to the public, subject to reasonable time, place, and manner restrictions. *See id.* at 45.

107. *Id.* at 45-46.

108. *Id.* at 46.

designated public forum.[109] In a footnote, the Court explained that a public forum could be created for a limited purpose, such as for use by certain limited groups or for the discussion of certain subjects.[110]

PLEA argued that the school mail facilities at issue constituted the new middle category, which it called a "limited public forum."[111] The Court, however, rejected this argument, reasoning that the school district had not opened its mail system to indiscriminate use by the general public.[112] Rather, any group seeking to use the school's mail system had to ask the building principal for permission.[113] The Court stated that this type of selective access did not transform the school's property into a public forum.[114] Although the forum might be considered a limited public forum, the constitutional right of access to it extends only to other entities of similar character.[115] In holding that PLEA did not have a right of access, the Court implicitly determined that PLEA, which concerned itself with the terms and conditions of teacher employment, was not of the same character as other groups, which the Court characterized as engaging in "activities of relevance and educational relevance to students," that had been permitted access.[116] Because the restriction was not viewpoint-based, the Court applied the rational basis test and concluded that the school's policy was valid.[117]

*Perry* has been credited with definitively setting out the categories that have guided public forum analysis.[118] Despite this achievement, the *Perry* Court was not able to propose a solution that would answer many of the questions that would inevitably arise in the wake of the heralding of the existence of an intermediate category. By categorizing the internal mail system as a nonpublic forum, the *Perry* Court did not have to give the intermediate category anything more than a cursory, if now-famous, mention.

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109. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998) (referring to the intermediate category as the "designated public forum").

110. *Perry*, 460 U.S. at 45 n.7.

111. *Id.* at 47.

112. *Id.*

113. *Id.*

114. *Id.* at 48. This would seem to contradict the statement that the Court made in an earlier footnote recognizing the public fora could be created for a limited purpose, such as allowing access only to certain groups. *Id.* at 45 n.7; *see infra* text accompanying notes 139-40 (discussing how these may in fact be read consistently).

115. *Perry*, 460 U.S. at 45-48.

116. *Id.*

117. Specifically, the Court found that the school district had an interest in preventing the school from becoming "a battlefield for inter-union squabbles." *Id.* at 52.

118. *See, e.g.*, United States v. Gilbert, 920 F.2d 878, 884 (11th Cir. 1991) (stating that the Supreme Court in *Perry* set out the framework for analyzing First Amendment challenges to governmental regulation).

## III. Analysis of the Current Situation: Post-*Perry* Supreme Court Cases

### A. *The Evolution of Public and Nonpublic Fora in the Wake of* Perry

Since *Perry*, numerous courts have expounded upon various aspects of the public forum doctrine, most of them limiting the applicability of the doctrine and expanding the ability of government to regulate expression on its property. Several courts, for example, have fashioned a distinction between property that government owns and property that government merely regulates.[119] In addition, a district court has recently declared that a forum's status as a "traditional public forum" is not immutable.[120] Rather, the court stated that traditional public fora do not maintain their public forum quality for all purposes and at all times; if government makes the case that the property is required to serve another compelling state interest, government may create a nonpublic or limited public forum within a traditional public forum.[121]

Although many of these may be seen as limiting the public forum doctrine to a certain extent, the public forum doctrine has also been broadened in at least one way. The Supreme Court has stated that the public forum doctrine applies to more than just physical property: it transcends spatial and geographical confines to embrace metaphysical fora as well, including such things as channels of communication.[122]

### B. *The Devolution of the Limited Public Forum in the Wake of* Perry*: Conflicting Supreme Court Cases from* Perry *to the Present*

The limited public forum, by contrast, has been the source of more confusion than clarity in the wake of *Perry*. One of the first Supreme Court cases to examine more closely the intermediate category of public forum, and one of the most oft-cited cases, is that of *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*[123] The federal government's exclusion of certain legal defense and advocacy organizations from participation in the Combined Federal Campaign (CFC), a charity drive aimed at federal employees,[124] gave rise to *Cornelius*.

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119. According to these courts, government should be accorded more deference when it is the proprietor of a certain forum, so that what was once strict scrutiny review for restrictions in certain government fora has turned into something less. *See* United States v. Kokinda, 497 U.S. 720, 725 (1990).

120. People for the Ethical Treatment of Animals v. Giuliani, 105 F. Supp. 2d 294, 315 (S.D.N.Y. 2000).

121. *Id.*

122. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

123. 473 U.S. 788 (1985).

124. *Id.* at 790.

In beginning its analysis, the Court paid tribute to *Perry*, crediting it with identifying the three types of fora.[125] The *Cornelius* Court's interpretation of the traditional public forum came as no surprise, as it accorded with previous descriptions of this category.[126] The Court's interpretations of the intermediate and nonpublic forum categories, however, deviated from prior formulations of these categories.

In describing the middle category, which the Court called "the public forum created by government designation," the Court reiterated *Perry*'s definition that such a forum could be created when government opened a place or channel of communication for use by the public at large.[127] To this definition, the court added the footnote from *Perry* stating that such an intermediate forum could be created for use by certain speakers or for the discussion of certain subjects.[128] In almost the very next sentence, however, the Court stated that government does not create a public forum by inaction or by permitting "limited discourse," but only by intentionally opening a nonpublic forum for public discourse.[129] The Court went on to name the government's intent as the touchstone to any determination of whether government had created an intermediate category of public forum.[130]

Applying this standard, the Court decided that government did not intend to create a public forum because government had been very selective in its access.[131] Rather, the Court declared the CFC to be a nonpublic forum.[132]

While *Cornelius* confirmed that an intermediate category of public forum existed, the Court's descriptions of this forum and its analysis of the plaintiff's claims have generated both confusion and criticism.[133] In both cases, the Court acknowledged the existence of an intermediate category of public forum, which could be limited to certain groups or

125. *Id.* at 802.

126. The Court described the traditional public forum by referring to the famous quote from *Perry* that traditional public fora are those places that "by long tradition or by government fiat have been devoted to assembly and debate." *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983).

127. *Id.*

128. *Id.* (citing *Perry*, 460 U.S. at 46 n.7).

129. *Id.*

130. *Id.*

131. Government allowed only charities that were tax-exempt, were non-profit, were supported by contributions from the public, and provided direct health and welfare services to individuals. *Id.* at 792.

132. *Id.*

133. The most famous of these critical remarks comes from Justice Blackmun's dissent to the *Cornelius* majority opinion. Justice Blackmun pointed out the seeming circularity of the majority's opinion: the CFC is not a limited public forum because government intended to limit the forum to a particular class of speakers. *Cornelius*, 473 U.S. at 813-14 (Blackmun, J., dissenting).

subjects,[134] and recognized that the fora at issue arguably would fit this category,[135] but, in each case, the Court declared the fora to be nonpublic.[136] Some courts have interpreted this to indicate that, in order to qualify as a limited public forum, a location must be open to the public at large.[137]

At the same time, other courts have interpreted the Court's findings in *Perry* and *Cornelius* to be consistent with *Perry*'s language that a middle category of public forum could be created for a limited class.[138] A closer examination of *Perry* and *Cornelius* reveals that the reason that the Court was hesitant to name anything other than a nonpublic forum in both cases is due to the limited access granted certain individuals.[139] As the Court later stated,[140] the fact that government opens up a forum on a restricted, permission-only basis suggests that the purpose of the forum is not compatible with expressive activity.[141]

Several Supreme Court decisions following *Cornelius* failed to provide any additional insights into the natures of the intermediate categories. In these cases, the Court was able to avoid the more difficult issues plaguing the public forum doctrine, including the question of how to interpret the contradictory language of *Cornelius*. In both *Lamb's Chapel v. Center Moriches Union Free School District*[142] and *Rosenberger v. Rector and Visitors of the University of Virginia*,[143] the Court avoided analyzing a limited public forum in any depth because the

134. *Id.* at 802; *Perry*, 460 U.S. at 45 n.7.

135. *See supra* notes 88-89, 124 and accompanying text.

136. *Cornelius*, 473 U.S at 802; *Perry*, 460 U.S. at 47.

137. *See, e.g.*, Fighting Finest v. Bratton, 95 F.3d 224, 230 n.5 (2d Cir. 1996) (stating that one of the judges believes that, to qualify for "public use," a location or channel of communication must be open to the public at large or to a class or group whose meetings are open to the public at large).

138. *See, e.g.*, *id.* at 230 n.6 (stating that another judge on the same court believes that, to qualify as a limited public forum, a location or channel of communication need not be open to the public at large, but may be open to only a particular segment of the public).

139. In *Perry*, individuals seeking to use the internal mail system for communication were required to ask the building principal for permission. *Perry*, 460 U.S. at 47. In *Cornelius*, the excluded individuals claimed that the class consisted of all charitable organizations. It was clearly the case that not all such organizations were allowed to participate, however, as only 237 out of more than 850,000 groups that qualified for tax-exempt status in 1980 were invited to participate. *Cornelius*, 473 U.S. at 804.

140. *See* Warren v. Fairfax County, 196 F.3d 186, 193 (4th Cir. 1999) (citing Widmar v. Vincent, 454 U.S. 263, 264 (1981)).

141. Even Justice Blackmun would agree with this statement, as in his dissent he points out that the fact that government occasionally may invite a speaker to a military base to lecture on drug abuse does not necessarily mean that the use of the base would be compatible with all would-be speakers, or even all those wishing to speak about drug abuse. *Cornelius*, 473 U.S. at 820 (Blackmun, J., dissenting).

142. 508 U.S. 384 (1993).

143. 515 U.S. 819 (1995).

Court found both governmental restrictions to be viewpoint-based and therefore presumptively impermissible.[144]

In *Lamb's Chapel*, the Court mentioned and did not contradict the lower court's interpretation that the school had opened a limited public forum.[145] In describing the categories of public fora, however, the Court made reference only to the designated public forum and the nonpublic forum.[146] The Court stated that public property that is not open to indiscriminate use by the public for communicative purposes—which the Court referred to as a designated public forum—is a nonpublic forum.[147] The school property was not open to the public for indiscriminate communication, and thus the property failed to qualify as a designated public forum.[148] Because the Court found the school's restriction to be viewpoint-based, however, the Court subjected the school's restriction to strict scrutiny review.[149]

Without explaining how it reached a similar conclusion, the *Rosenberger* Court referred to the school's Student Activities Fund (SAF) as a limited public forum and announced that the state could not exclude speakers from such a forum on the basis of their viewpoints.[150] The Court described the rational basis test as the standard of review for limited public fora, citing *Perry* and *Cornelius*,[151] even though *Perry* provided that the rational basis test was for nonpublic fora.[152] But, because the Court quickly concluded that the school's restrictions amounted to an impermissible viewpoint-based exclusion,[153] the Court did not have to apply this rational basis test to the limited public forum.

The Supreme Court's most recent decision involving the public forum doctrine is *Good News Club v. Milford Central School*,[154] which followed in the same vein as both *Lamb's Chapel* and *Rosenberger*. In *Good News*, a private Christian organization for young children applied to use a school cafeteria for after-school meetings.[155] In subjecting the school district's refusal of the organization's application to public forum analysis, the Court first noted that limited public fora do not receive strict

144. *Rosenberger*, 515 U.S. at 831; *Lamb's Chapel*, 508 U.S. at 387.
145. *Lamb's Chapel*, 508 U.S. at 390.
146. *Id.* at 392.
147. *Id.* at 392-93 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).
148. *Id.* at 393.
149. *Id.*
150. *Id.*
151. *Id.*
152. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).
153. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995).
154. 533 U.S. 98 (2001).
155. *Id.* at 103.

scrutiny, as do traditional public fora.[156] Again, however, the Court managed to avoid the issue of precisely what rules govern the intermediate category(ies) of public fora, as the parties agreed that the school district had created a limited public forum.[157]

The Court noted that in a limited public forum government does not, by definition, allow all types of expressive activity.[158] The Court then stated that the constitutional limits placed on the ability to limit a forum are that the restriction must be viewpoint-neutral and reasonable in light of the purpose of the forum.[159] In other words, limited public fora are subject to only a rational basis standard of review. Because the Court found that the restriction was viewpoint-based,[160] the Court did not have to decide the issue of whether the school district's restriction was reasonable in light of the school's compatibility with expressive activity.

## IV. The Diverse Roads Taken by the Circuit Courts

Despite the acceptance of a middle ground between the traditional public forum and the nonpublic forum, the courts have become hopelessly "dazed and confused" over whether this middle ground consists of one or two categories, and, if the latter, how they relate to one another.[161] Caselaw dealing with the intermediate category of public fora has generally agreed that the main category of intermediate public forum between the traditional public forum and the nonpublic forum is called the "designated public forum," but beyond this the courts are in utter disagreement.

In describing the relationship between this designated public forum and limited public fora, courts have variously said: (1) the designated public forum and the limited public forum are interchangeable terms describing the same thing and both receive strict scrutiny review;[162] (2) a limited public forum is a type of designated public forum and both

156. *Id.* at 106.

157. *Id.*

158. *Id.*

159. *Id.* at 107 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)). Although the Court cites *Cornelius* for this proposition, it is important to note that the *Cornelius* Court stated that this level of review would be appropriate for *non*public fora, not limited public fora. *Cornelius*, 473 U.S. at 806.

160. *Good News*, 533 U.S. at 109.

161. *See, e.g.*, Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 842 n.5 (6th Cir. 2000) (recognizing the uncertainty as to whether there are one or two categories of fora other than public and nonpublic fora, and what protection is due these categories).

162. *See* Heartbeat of Ottawa County v. City of Port Clinton, 207 F. Supp. 2d 699, 702 n.2 (N.D. Ohio 2002) (noting that a limited public forum has alternatively been described as a designated public forum and that limited public fora receive the same strict scrutiny review applicable to traditional public fora).

receive strict scrutiny review;[163] (3) a limited public forum is a type of nonpublic forum that receives only rational basis review;[164] (4) a limited public forum can be either a type of designated public forum or a type of nonpublic forum, the former receiving strict scrutiny review and the latter receiving only rational basis review;[165] (5) a limited public forum is a type of designated public forum but the limited public forum receives only rational basis review;[166] and (6) a limited public forum is a type of designated public forum whose standard of review depends on whether the speaker falls inside or outside of the limiting class set by government.[167]

### *A. Circuit Courts That Have Located the Limited Public Forum Under the Designated Public Forum and Applied Strict Scrutiny Review to Both*

In the first category are those courts that have interpreted Supreme Court precedent to say that the limited public forum is either the same as or a subset of the designated public forum, and that both designated and limited public fora should receive strict scrutiny review. Courts in the First,[168] Third,[169] Sixth,[170] Eighth,[171] Eleventh,[172] and D.C.[173] Circuits

163. *See* Van Bergen v. Minnesota, 59 F.3d 1541, 1553 n.10 (8th Cir. 1995) (stating that the second category of public fora is the designated public forum, which may be of the limited or unlimited type, both of which types receive strict scrutiny review) (citing Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992)).

164. *See* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958 (9th Cir. 1999) (interpreting Supreme Court precedent as stating that a limited public forum is a subset of the nonpublic forum).

165. *See* Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997).

166. *See* Hopper v. City of Pasco, 241 F.3d 1067, 1074-75 (9th Cir. 2001) (stating that, if a forum is "merely a 'limited public forum,'" the court must apply a reasonableness test rather than a strict scrutiny test).

167. Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation, 311 F.3d 534 (2d Cir. 2002).

168. *See* New Eng. Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002) (stating that a designated public forum is sometimes called a limited public forum).

169. *See* Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177, 185 (3d Cir. 1999) (noting the confusion between the designated public forum and the limited public forum and applying the same strict scrutiny review to both).

170. *See* Kincaid v. Gibson, 236 F.3d 342, 348 (6th Cir. 2001) (stating that the intermediate category has been alternatively referred to as the "designated public forum" and the "limited public forum" and finding that strict scrutiny review applies to both).

171. *See* Burnham v. Ianni, 119 F.3d 668, 675 n.11 (8th Cir. 1997) (using the terms interchangeably, and deciding to refer to the intermediate category by the term "limited public forum") (citing ISKON v. Lee, 505 U.S. 672, 686 (1992)).

172. *See* M.N.C. of Hinesville, Inc. v. United States Dep't of Def., 791 F.2d 1466, 1472 (11th Cir. 1986).

173. *See* NAACP Legal Def. & Educ. Fund v. Devine, 727 F.2d 1247, 1256-57 (D.C. Cir. 1984).

have taken this particular path. The most instructive case for examining the potential shortcomings of this type of categorization can be seen in the Eleventh Circuit case of *Chandler v. Georgia Public Telecommunications Commission*.[174]

In *Chandler*, the Georgia Public Telecommunications Commission (GPTC) sought to broadcast a political debate between the Democratic and Republican candidates for Georgia's lieutenant governor.[175] Two Libertarian candidates for lieutenant governor, however, were not allowed to participate in the debate.[176] The Libertarians sued GPTC, alleging both First Amendment and Equal Protection violations.[177]

Although the majority's First Amendment analysis fails even to mention any of the names of the public forum categories, it is clear that the court was otherwise following a public forum doctrine analysis. As the first step in its First Amendment analysis, the court stated that, when the channel of communication does not function as a "marketplace of ideas," the state may regulate the content of the channel.[178] Because GPTC was not a medium open to everyone regardless of the nature of the message,[179] it was not a true marketplace of ideas.[180] Because the court concluded that GPTC's refusal was reasonable and not based on viewpoint discrimination,[181] the court instructed the district court to dismiss the Libertarians' complaint.[182]

Although disagreeing with the ultimate outcome of the case and clarifying perceived flaws in the majority's reasoning,[183] the dissent otherwise endorsed the majority's public forum analysis. The dissent began its public forum analysis by stating the taxonomy of fora created by *Perry*: traditional public fora, "created public forums,"[184] and

174. 917 F.2d 486 (11th Cir. 1990).

175. *Id.* at 488.

176. *Id.* GPTC instead offered the Libertarians thirty minutes of airtime to present their views. *Id.* at 488 n.1.

177. *Id.*

178. *Id.* This description resembles that of a designated public forum. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

179. *Chandler*, 917 F.2d at 488 n.1. The court found that GPTC made editorial decisions on a daily basis as to which programs to broadcast, and that choosing to broadcast one program necessarily meant that the exclusion of other programs during that period. *Id.* at 488-89.

180. *Id.* at 488.

181. *Id.* at 489 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

182. *Id.* at 490.

183. Judge Clark believed that GPTC had engaged in viewpoint discrimination and that GPTC should be enjoined from refusing to permit the Libertarian candidates to participate in the debate. *Id.* at 491-92 (Clark, J., dissenting).

184. The "created public forum" category corresponds to both the designated public forum and the limited public forum categories in *Cornelius*. *See Cornelius*, 473 U.S at

nonpublic fora.[185] In elucidating the created public forum category, the dissent quoted language from *Cornelius* stating that such a forum may be opened for the public at large or for only a small segment of the public.[186] The dissent reasoned, however, that government did not create such a created public forum because GPTC did not invite the general public to appear on GPTC's network and express its opinions on the election.[187] Instead, the dissent stated that the GPTC debate was a nonpublic forum.[188]

If GPTC had qualified as either a limited, designated, or "created" public forum, it would have been automatically subject to strict scrutiny review under the Eleventh Circuit's analysis.[189] By subjecting all property that the court finds is not a nonpublic forum to the nearly-impossible-to-pass strict scrutiny review, this approach would ostensibly seem to be more protective of speech. There are two problems with this cursory conclusion, however. First, as the *Chandler* case demonstrates, courts have been generally reluctant to classify fora as designated or limited.[190] This is likely because they are aware that in doing so they

802.

185. *Chandler*, 917 F.2d at 491 (Clark, J., dissenting).

186. *Id.* (Clark, J., dissenting).

187. *Id.* (Clark, J., dissenting) (citing *Cornelius*, 473 U.S. at 802).

188. *Id.* (Clark, J., dissenting).

189. *Id.* (Clark, J., dissenting).

190. A LexisNexis search performed on December 15, 2002, comparing the number of limited public fora actually found by the various courts in relation to the number of cases in which one of the parties alleged a limited public forum, showed that the circuits falling into this category were much less likely to classify a particular location as a limited public forum. The First Circuit found one limited public forum in seven public forum cases where one of the parties alleged a limited public forum. Yeo v. Town of Lexington, No. 96-1623, 1997 U.S. App. LEXIS 13198, at *56 (1st Cir. Jan. 6, 1997) (finding that high school newspaper and yearbook advertising spaces constituted limited public fora), *rev'd en banc on other grounds*, 131 F.3d 241, 255 (1st Cir. 1997). The Third Circuit classified three locations as limited public fora out of thirteen limited public forum cases. United States v. Goldin, 311 F.3d 191(3d Cir. 2002) (stating that the parties agreed that the Liberty Bell pavilion at issue was a limited public forum, but finding that the expressive activity attempted was outside the class to which the forum had been limited); Kreimer v. Bureau of Police, 958 F.2d 1242, 1263 n.24 (3d Cir. 1992) (classifying library as a limited public forum and finding that the library's rules that resulted in the expulsion of a homeless individual for smelling offensive and disrupting other patrons survived strict scrutiny review); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1380 (3d Cir. 1990) (finding high school auditorium constituted a "limited open forum"). The Sixth Circuit named two limited public fora in ten limited public forum cases. Kincaid v. Gibson, 236 F.3d 342, 353 (6th Cir. 2001) (finding student yearbook constituted a limited public forum); Hansen v. Westerville City Sch. Dist. Bd. of Educ., No. 93-3231, 1994 U.S. App. LEXIS 31576, at *19 (6th Cir. Nov. 7, 1994) (finding school board meeting to be a limited public forum). The Eighth Circuit did not conclusively name any designated or limited public fora in nineteen limited public forum cases. The Eleventh Circuit found three limited public fora in sixteen limited public forum cases. Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1549 (11th Cir.

almost automatically doom the government's restriction unless it can be classified as a reasonable time, place, and manner regulation.[191]

Second, although this approach may be very speech-protective for those select fora that have been placed into the categories of "designated public forum" or "limited public forum," the inherent weaknesses of this analysis have undermined its application. If the court automatically submits the government's decision to open a forum to any kind of public activity to strict scrutiny review, there are three likely outcomes. First, government is more likely to take the safe option of leaving the property closed to all discourse.[192] Second, government is more likely to adopt a very selective, permission-only policy of permitting limited expression.[193] Finally, government may even be likely to sell the location in question to a private company that will not be subject to the confines of the First Amendment.[194] As the Eleventh Circuit noted in *Chabad-Lubavitch v. Miller*,[195] once the state decides to designate a public forum, "the monkey is on the state's back."[196] In *Miller*, this meant that, once Georgia designated a government building as a public forum, it was Georgia's responsibility to ensure that reasonable observers of the plaintiff's menorah display located on the property did not mistakenly believe that Georgia endorses Judaism.[197] In a more general sense, it means that, once it opens a forum, government has certain responsibilities, which include granting equal access to all those within the designated class. Both of these situations are conducive to less, not more, expression.

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1997) (finding that the university opened up a limited public forum); Chabad-Lubavitch v. Miller, 5 F.3d 1383, 1391 (11th Cir. 1994) (agreeing with the lower court that the rotunda of the capitol building constituted a limited public forum); Crowder v. Hous. Auth., 990 F.2d 586, 591 (11th Cir. 1993) (agreeing with the district court that an apartment building auditorium constituted a limited public forum). Finally, the D.C. Circuit has failed to locate any designated or limited public fora. *See generally* cases cited *infra* notes 223, 250.

191. *See, e.g.*, United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998) (finding the state agency created a designated public forum and failed to show a compelling reason for excluding plaintiff's controversial advertisement).

192. Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 347 (5th Cir. 2001).

193. Warren v. Fairfax County, 196 F.3d 186, 193 (4th Cir. 1999).

194. Chi. Acorn v. Metro. Pier & Exposition Auth., 150 F.3d 695, 704 (7th Cir. 1998) (stating that, if the First Amendment handcuffs the effective exploitation of commercially valuable public property, government will have an incentive to sell it to a private company, which will not be cabined by the First Amendment).

195. 5 F.3d 1383 (11th Cir. 1993).

196. *Id.* at 1394.

197. *Id.*

### B. *Courts That Have Located the Limited Public Forum Under the Designated Public Forum but Applied Only Rational Basis Review to Limited Public Fora*

In the second category are those courts that have located the limited public forum in the category of either designated public forum or nonpublic forum but in either case have subjected limited public fora to only rational basis review. Courts that have followed this path include the Second,[198] Fifth,[199] Seventh,[200] and Ninth[201] Circuits.

The Ninth Circuit's recent case of *DiLoreto v. Downey Unified School District Board of Education*[202] serves as a paradigm of this analysis. In *DiLoreto*, the plaintiff paid $400 to place an "advertisement" on a high school baseball field fence.[203] The "advertisement" consisted mostly of the Ten Commandments.[204] The school removed the advertisement for fear of provoking controversy.[205] The school also excluded proposed ads for alcohol and taverns, and any ads by Planned Parenthood.[206] The court found that the baseball field was a limited public forum, limited to certain subjects.[207] The court placed this limited forum in the category of nonpublic forum, however, and subjected the school district's actions to reasonableness review.[208]

The court began its analysis in familiar fashion by stating that there are three types of public fora: the traditional public forum, the designated public forum, and the nonpublic forum.[209] The court defined a traditional public forum as a place that has been traditionally available for public expression[210] and a designated public forum as a nontraditional forum that government intentionally opens to public discourse, to which strict scrutiny review applies.[211] According to the court, all remaining public property is a nonpublic forum, which is subject to only rational basis review.[212] This distinction was based on *Lamb's Chapel* and

198. *See* Perry v. McDonald, 280 F.3d 159, 173 (2d Cir. 2001).
199. *See* Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330 (5th Cir. 2001).
200. *See* DeBoer v. Vill. of Oak Park, 267 F.3d 558, 575 (7th Cir. 2001).
201. *See* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958 (9th Cir. 1999).
202. 196 F.3d 958 (9th Cir. 1999).
203. *Id.* at 962.
204. *Id.*
205. *Id.*
206. *Id.* at 963.
207. The court found that the field was limited mainly to those that helped raise money for the school in a non-controversial way. *Id.* at 962.
208. *Id.* at 965.
209. *Id.* at 964.
210. *Id.*
211. *Id.* at 964-65.
212. *Id.* at 965.

*Rosenberger*, which the court interpreted as standing for the proposition that a limited public forum is a nonpublic forum that government opens to certain groups or topics and then limits as it sees fit.[213]

The *DiLoreto* court then stated the maxim from *Cornelius* that government does not create a designated public forum simply by permitting limited discourse.[214] Rather, government must intend to create a public forum.[215] In determining this subjective element, the court is supposed to look to various objective factors—the nature of the property, the policy and practices of government, and the compatibility of the property with expressive activity.[216] Under this reasoning, if government decides to allow commercial advertising but not political speeches or religious preaching, it means that government did not intend to designate the place as a public forum (open to all speech), and thus government can place such restrictions on the property even if the property is compatible with such expressive activity.

Applying this standard to the case before it, the court found that government did not intend to create a public forum for all expressive activity because it clearly excluded speech of certain kinds.[217] Instead, government intended to created a limited public forum that would be *closed* to some—those who wanted to post controversial advertisements.[218] Thus, the court found the baseball field fence to be a nonpublic forum open for a limited purpose—to raise money.[219] Because government had not opened the forum to a discussion about religion, the plaintiff had no right to use the forum for religious expression.[220] The court found the restriction to be a permissible content-based regulation.[221]

Like the methodology that equates designated and limited public fora, the Ninth Circuit's line of interpretation is also problematic. Rather than view the limited public forum as a forum that is at least "half-open" to expressive activity, the Ninth Circuit chose to view it as "half-closed" to expressive activity. As such, the court was able to relocate the limited public forum to the category of nonpublic forum, which had traditionally been viewed as entirely closed (or at least nearly so) to expressive

213. *Id.* As noted by the Ninth Circuit in a later case, this leads to the strange semantic result that a limited public forum is thus *not* actually a public forum. Hopper v. City of Pasco, 241 F.3d 1067, 1075 n.8 (9th Cir. 2001).
214. *DiLoreto*, 196 F.3d at 965.
215. *Id.*
216. *Id.*
217. That is, speech dealing with alcohol, birth control, and religion. *Id.* at 967.
218. *Id.*
219. *Id.* at 966.
220. *Id.* at 969.
221. *Id.*

activity.[222]

The problem with this relocation is that many fora, which are not exactly half-closed, that would otherwise fall into the limited public forum category may now slip through the cracks of the judicial system. Although courts in this category are generally less hesitant to stick a "limited public forum" label on a location,[223] the Ninth Circuit has

222. *See* Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *16 (N.D.N.Y. Feb. 15, 2000), *vacated*, No. 00-9054, 2001 U.S. App. LEXIS 5281 (2d Cir. 2001).

223. A LexisNexis search conducted on December 15, 2002, comparing the number of limited public fora actually found by the various courts in relation to the number of cases in which one of the parties alleged a limited public forum, indicates that circuit courts falling into this category are much more likely to classify a particular location as a "limited public forum" under their definition of the term. The Second Circuit named six limited public fora in twenty-two limited public forum cases. Amandola v. Town of Babylon, 251 F.3d 339, 344 (2d Cir. 2001) (finding that the Town's written policy constituted a limited public forum); Good News Club v. Milford Cent. Sch., 202 F.3d 502, 509 (2d Cir. 2000) (finding school building constituted a limited public forum), *rev'd*, 533 U.S. 98 (2001); Full Gospel Tabernacle v. Cmty. Sch. Dist. 27, 164 F.3d 829, 830 (2d Cir. 1999) (affirming that school facilities constituted a limited public forum); Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 212 (2d Cir. 1997) (finding school auditorium to be a limited public forum), *overruled in part by Good News*, 533 U.S. 98; Lebron v. AMTRAK, 69 F.3d 650, 656 (2d Cir. 1995) (stating that, perhaps, a Penn Station display constituted a limited public forum limited to commercial purposes); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 959 F.2d 381, 388 (2d Cir. 1992) (finding school facilities constituted limited public fora but not for religious uses), *rev'd*, 508 U.S. 384 (1993). The Fifth Circuit named three limited fora in eighteen limited public forum cases. Campbell v. St. Tammany Parish Sch. Bd., 231 F.3d 937, 941 (5th Cir. 2000) (finding school facilities constituted a limited public forum); Gay Student Servs. v. Tex. A & M Univ., 737 F.2d 1317, 1332 (5th Cir. 1984) (finding university campus to be at least a limited public forum); Ysleta Fed'n of Teachers v. Ysleta Indep. Sch. Dist., 720 F.2d 1429, 1433 (5th Cir. 1983) (finding school mail system constituted a limited public forum). The Seventh Circuit did not name any limited public fora in eleven potential limited public forum cases. The Ninth Circuit named twelve limited public fora in twenty-five public forum cases. Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002) (finding school created a limited public forum by allowing some students to use the school's facilities); Culbertson v. Oakridge Sch. Dist. No. 76, 258 F.3d 1061, 1064 (9th Cir. 2001) (finding elementary school constituted a limited public forum); Gentala v. City of Tucson, 213 F.3d 1055, 1062 (9th Cir. 2000) (finding that the City's civics events fund constituted a limited public forum), *overruled in part by Good News*, 533 U.S. 98; Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1039 (9th Cir. 1999) (finding university created a limited public forum); NAACP v. Jones, 131 F.3d 1317, 1322 (9th Cir. 1997) (finding voter's pamphlet was a limited public forum); Zimmerman v. Nakatani, No. 90-16158, 1991 U.S. App. LEXIS 30556, at *6 (9th Cir. Dec. 19, 1991) (stating that the state fair was a limited public forum, although this was not the principal issue in the case); Geary v. Renne, 914 F.2d 1249, 1256 (9th Cir. 1991) (finding voter's pamphlet constituted a limited public forum); Kaplan v. County of Los Angeles, 894 F.2d 1076, 1080 (9th Cir. 1990) (finding voter's pamphlet to be a limited public forum); San Diego Committee Against Registration & the Draft (CARD) v. Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471, 1476 (9th Cir. 1986) (finding student newspaper to be a limited public forum); Cinevision Corp. v. City of Burbank, 745 F.2d 560, 581 (9th Cir. 1984) (finding that the Starlight Bowl constituted a limited public

recently taken this methodology one step further and said that the terms "limited public forum" and "nonpublic forum" are interchangeable and that the distinction between the two was purely a semantic one with no analytic difference.[224]

Even more troubling, the *DiLoreto* court has set a very difficult standard for anyone seeking to challenge a restriction when government did not dedicate the property to each and every kind of expressive activity imaginable.[225] As long as government excludes some kind of expressive activity from its forum, it remains safe to exclude them all.[226] This methodology, like that of the first category, also discourages government from opening a forum to all by providing clear disincentives for doing so, coupled with clear incentives for its closing the forum.

A perhaps even more convoluted method of limited public forum doctrine analysis has very lately appeared in one of the Second Circuit's most recent public forum doctrine cases, *Perry v. McDonald*.[227] In determining what type of forum motor vehicle license plates constituted, the court noted that the Supreme Court has recognized a limited public forum as a subcategory of the designated public forum.[228] Instead of subjecting limited designated public fora to strict scrutiny review, however, the court stated that government restrictions in a limited public forum need be only reasonable rather than compelling.[229]

This approach raises similar problems to that of the *DiLoreto* court. First, this approach makes it too easy for government to promulgate speech-restrictive regulations.[230] Second, this methodology succeeds only in making public forum doctrine analysis even more convoluted.

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forum); United States v. Albertini, 710 F.2d 1410, 1415-16 (9th Cir. 1983) (finding military open house constituted a "temporary public forum"), *rev'd*, 472 U.S. 675 (1985). *See generally* cases cited *supra* notes 190, 250.

224. *Gentala*, 213 F.3d 1055.

225. *See, e.g.*, Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring in part in the judgment) (stating that the requirements for a designated public forum are so stringent as practically to render the category devoid of any content, and predicting that few, if any, types of property other than those already recognized as public fora will be accorded such status).

226. *See, e.g.*, Pichelmann v. Madsen, 31 Fed. Appx. 322, 327 (7th Cir. 2002) (stating that the university e-mail system at issue was not a limited public forum because it was not open indiscriminately to the general public).

227. 280 F.3d 159 (2d Cir. 2001).

228. *Id.* at 167 n.4 (citing Gen. Media Communications, Inc. v. Cohen, 131 F.3d 273, 278 n.6 (2d Cir. 1997)).

229. *Id.* (citing *Gen. Media Communications*, 131 F.3d at 278 n.6). This view is also shared by the court in *Pichelmann*. *Pichelmann*, 31 Fed. Appx. at 327.

230. Although the Second Circuit classified six locations as limited public fora under its pre-*Perry* analysis, *see* cases cited *supra* note 219, in only one of these cases did government fail the rational basis test. Amandola v. Town of Babylon, 251 F.3d 339, 344-45 (2d Cir. 2001) (finding Town's written policy to be an unconstitutional prior restraint on speech).

According to traditional public forum doctrine guidelines, designated public fora receive strict scrutiny review.[231] Here, however, the court subjects what it deems a type of designated public forum to rational basis review, which had previously been reserved for only nonpublic fora.[232] This approach empties the limited designated public forum classification of meaning and makes the limited public forum a designated public forum in name only.

### C. *Courts That Have Located the Limited Public Forum Under Both the Designated and the Nonpublic Fora*

In the third category are those courts that, confused by the shifting between the designated and the nonpublic fora, have located the "limited public forum" in both places.[233] These courts have said that both designated and nonpublic fora may be considered to be limited.[234] The main proponent of this approach is the Tenth Circuit.[235]

In *Summum v. Callaghan*,[236] a county and its commissioners attempted to exclude a church group from constructing a religious monolith on the grounds of the county courthouse.[237] In determining that the county had created a limited public forum, the court cited both *Widmar*, in which the Court found a limited public forum and applied strict scrutiny, and *Rosenberger* and *Lamb's Chapel*, in which the Court found limited public fora but applied only a rational basis test.[238] The Court tried to delineate the parameters of the designated public forum by pointing out that, in determining whether government had created a designated public forum, courts must examine several factors.[239] These factors include the purpose of the forum, the extent of the use of the forum, and the intent of government.[240] In examining the extent of the use requirement, the court noted that, in order to create a designated public forum, government would have to allow some kind of "general access" to the forum in question, either to the general public or to a certain group of individuals.[241] "Selective access" or "limited discourse" will not qualify a forum as a designated public forum, but rather will

231. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).
232. *See, e.g., id.* at 46.
233. *See* Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997).
234. *See id.* at 914.
235. *See id.*
236. 130 F.3d 906 (10th Cir. 1997).
237. *Id.* at 910.
238. *Id.* at 914-15.
239. *Id.* at 915.
240. *Id.*
241. *Id.*

keep it in the nonpublic forum category.[242]

In examining the third factor, the intent of government, the court identified two additional factors to help discern intent: the policy and practice of government and the nature of the property and its compatibility with expressive activity.[243] When the policy or practice at issue operates selectively to limit access to the forum—for example, by requiring individuals to apply for permission to use the forum—or when the principal purpose of the forum would be disrupted by expressive activity, the court will be reluctant to find that government designated a forum.[244]

In applying these factors to the case before it, the court found that, because government had not opened a designated public forum, the plaintiff could not prove a designated public forum for a limited purpose and thus could not derive the benefit of a strict scrutiny standard of review.[245]

The court then looked to whether government had created a nonpublic forum of the limited variety, which the court called a "limited public forum."[246] The court recognized that the boundary between a designated public forum for a limited purpose and a limited public forum is far from clear.[247] Because the plaintiff failed to allege that government had created a designated public forum, it was unnecessary to differentiate between the two.[248] The court found that the county did create a limited public forum but, because the county engaged in viewpoint-based discrimination, it did not have to subject the county's actions to the reasonableness test.[249]

This approach raises problems similar to those raised by the Ninth Circuit in *DiLoreto*. By mandating that the plaintiff prove a designated public forum before a designated public forum of a limited type can be shown, the court set a high bar for plaintiffs.[250] This approach seems to confuse the designated public forum with something like a "dedicated public forum" by saying that a designated public forum must be a place

242. *Id.*
243. *Id.* at 916.
244. *Id.*
245. *Id.* The only thing that the plaintiff could point to was that the courthouse had allowed someone to post a Ten Commandments monolith on its lawn. *Id.*
246. *Id.*
247. *Id.* at 916 n.14.
248. *Id.* at 916.
249. *Id.*
250. A LexisNexis search conducted on December 15, 2002, indicates that the Tenth Circuit named only one designated public forum in twelve potential designated public forum cases. Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1278 (10th Cir. 1996) (finding senior citizen's center constituted a designated public forum). *See generally* cases cited *supra* notes 190, 223.

or channel of communication dedicated to expressive activity.[251] At the same time, by placing what the Tenth Circuit called the "limited public forum" in the nonpublic forum category, the court again faces the problem of allowing government to restrict speech in almost any way it wants without having to face meaningful constitutional consequences.[252]

### *D. Courts That Have Located the Limited Public Forum Under the Designated Public Forum but Make the Standard of Review Dependent upon the Speaker's Class*

In the fourth category are those courts that have classified limited public fora as designated public fora, but have made the standard of review dependent upon whether the would-be speaker falls inside or outside the class established by government. The two circuits that have split the standard of review for limited designated public fora have done so based on two different aspects: the speaker's relationship to the selected class,[253] and the selection of the class itself.[254]

#### 1. The Fourth Circuit's Approach

In *Warren v. Fairfax County*,[255] the Fourth Circuit established two different standards applicable to "limited designated public forums." In *Warren*, the plaintiff filed for a permit to put up a holiday display in a mall, which adjoined a government complex by a sidewalk.[256] According to the court, the mall constituted a traditional public forum because as an "open public thoroughfare" it possessed the physical characteristics of a traditional public forum.[257] Thus, although the court did not have to attempt to unravel the mystery of the limited public forum doctrine, it nonetheless stated the standards that applied.

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251. It is interesting to note that several courts have referred to the designated public forum category as a "dedicated public forum." *See, e.g.*, Pfeifer v. City of West Allis, 91 F. Supp. 2d 1253, 1259 (E.D. Wis. 2000). It seems, however, that these courts use the terms "designated" and "dedicated" interchangeably, without meaning any distinction. *See, e.g.*, *id.* (stating that a "dedicated public forum" may be created for a limited purpose).

252. Of the two limited public fora that the Tenth Circuit has named, neither of the governmental entities conclusively failed the rational basis test. *See* Pryor v. Coats, 203 F.3d 836 (10th Cir. 2000); Summum v. Callaghan, 130 F.3d 906, 919 (10th Cir. 1997) (remanding the case to the lower court to determine whether the county unconstitutionally discriminated against plaintiff's speech on the basis of plaintiff's viewpoint).

253. *See* Fighting Finest v. Bratton, 95 F.3d 224, 225-28 (2d Cir. 1996).

254. *See* Warren v. Fairfax County, 196 F.3d 186, 188 (4th Cir. 1999) (en banc).

255. 196 F.3d 186 (4th Cir. 1999) (en banc).

256. *Id.*

257. *Id.* at 189.

The court began on a contradictory note by remarking that limited public fora are synonymous with designated public fora but then stating that limited public fora are a subset of designated public fora.[258] It then noted that two levels of review apply to limited public fora.[259] Instead of trying to subject the limited public forum to either of the single standards of review of the other circuits, the court broke the governing standard for limited public fora into two distinct categories, which the court labeled "internal" and "external."[260]

The court called the first standard the "internal standard," which would apply if the excluded speaker falls within the class to which the limited public forum has been made generally available.[261] Thus, the class itself is treated as a traditional public forum to which strict scrutiny applies.[262] The court did not, however, address the standard that should be given if a speaker were to fall outside the established class.

The court called the second standard the "external standard," which places restrictions on the government's initial ability to designate the class.[263] The court noted that the Supreme Court has yet to state clearly what these external limitations are,[264] but reasoned that it made sense to subject the designation to only rational basis review, because property lacking affirmative government designation would be treated as a nonpublic forum.[265] Once again, the court was not able to put this two-pronged standard into practice, however. Because the court found the mall to be a traditional public forum,[266] the court did not have to reach the issue.

2. The Second Circuit's Approach

The Second Circuit has similarly fashioned a two-level method of analysis for limited public fora,[267] although the two levels differ from those of the Fourth Circuit. Like the Fourth Circuit, the Second Circuit has also based its standard of review on whether the excluded speaker belonged to the class for whose benefit the forum was created.[268] If the excluded speaker falls within the class, the government's restriction

258. *Id.* at 193.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 194.
264. *Id.*
265. *Id.*
266. *Id.* at 189.
267. *See* Fighting Finest v. Bratton, 95 F.3d 224, 225-28 (2d Cir. 1996).
268. *Id.*

should be subjected to the same strict scrutiny review that usually applies to traditional public fora.[269] If the speaker does not fall within the designated class, however, the government's regulation is subjected only to rational basis review.[270] The court did not have occasion to test its double level of review, however, as the court concluded that the forum at issue—police department bulletin boards—constituted a nonpublic forum.[271]

## V. Out of the Confusion Emerges a Proposed Solution

While the Second Circuit seems to have abandoned its two-pronged limited forum analysis in one of its most recent decisions, *Perry v. McDonald*,[272] its *Fighting Finest* standard nonetheless shows promise, as does the analysis of the Fourth Circuit in *Warren*. For the most comprehensive resolution to the mystery of the limited public forum, courts should apply a combination of the two standards, with two internal standards of review and one external standard of review.

### *A. A Proposed Relocation of the Limited Public Forum Category*

To implement this combined standard of review, a court must first find that a limited public forum has been created. In order to make this analysis easier, courts should agree on the location of the limited public forum. Traditionally, courts have tended to locate the limited public forum either under the designated public forum or more recently under the nonpublic forum (or at times both). Both of these classifications can raise difficulties. Both the Fourth and Second Circuits have located the limited public forum under the category of designated public forum, but, in some jurisdictions, this location has become problematic as courts have interpreted it to mean that, in order to prove a limited designated public forum, a plaintiff must first prove that a designated public forum is open to the public at large or to all expressive activity in general.[273] In contrast, placing the limited public forum in the category of nonpublic forum automatically subjects the limited public forum to rational basis review, which does not seem to fit with the principle that a limited public forum is opened, to some extent, for expressive activity.

A possible solution to the limited public forum location conundrum is to refer to the limited public forum as its own distinct category to

269. *Id.*
270. *Id.*
271. *Id.* at 230-32.
272. 280 F.3d 159 (2d Cir. 2001).
273. *See* DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 967 (9th Cir. 1999).

describe those fora that have been opened to some expressive activity and that are neither traditional, designated, or nonpublic fora. That is to say, a limited public forum would be neither a place that has always been used primarily for public debate (a traditional public forum), nor a place that government opens to the public in general for expressive activity (a designated public forum), nor a place that government selectively opens on a permission-only basis to expressive activity (a nonpublic forum). A limited public forum would be a location or channel of communication that has been opened to some segment of the public, though not the public at large. This solution would ensure that the limited public forum does not become too fused or confused with either the designated or the nonpublic forum.

As a corollary to this solution, courts can eliminate the designated public forum category or relocate it as a subset of the traditional public forum category to make public forum analysis less complicated. Technically, the designated public forum, to the extent that it refers to property that has been designated as available for expressive activity for the general public, is redundant. Such property would fit into the "government fiat" part of the traditional public forum definition, under which property that has been dedicated to expressive activity by government agreement qualifies as a traditional public forum.[274] Although eliminating the designated public forum entirely might prove confusing, relocating the designated public forum under the traditional public forum would be more consistent with the original definitions of both a traditional and a designated public forum.

### B. *A Proposed Dual Standard of Review for the New Limited Public Forum*

Much of the confusion that accompanies the limited public forum arises because it is closely related to both a designated public forum and a nonpublic forum.[275] A limited public forum is like a designated public forum to those who have been allowed access to the property for expressive activity, but, at the same time, it is like a nonpublic forum to those who have not been allowed access.

In order to help resolve this confusion, courts should recognize both of these aspects of the limited public forum by subjecting the limited public forum to two standards of review depending on the excluded speaker's relationship to the selected class. If the speaker falls within the

274. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

275. Ala. Student Party v. Student Gov. Ass'n of the Univ. of Ala., 867 F.2d 1344, 1350 (11th Cir. 1989) (Tjoflat, J., dissenting) (noting that a limited public forum is a combination of the traditional and the nonpublic fora).

selected class, the government's exclusion should be subjected to strict scrutiny review, since the forum would be akin to a designated public forum from the perspective of the excluded speaker's class.[276] This would eliminate the problem of giving government an incentive to close the forum for fear of being subjected to strict scrutiny review, as government will only be subjected to this standard if the excluded speaker falls within the same class. In such cases the government's regulation would likely have been subject to strict scrutiny review without an internal limited public forum standard, because, if someone who falls within the already-established class is excluded, courts are likely to find viewpoint discrimination and apply a higher level of scrutiny.[277] The proposed internal standard of strict scrutiny for those falling within the selected class would thus protect against what the Supreme Court has determined to be the most invidious kind of speech suppression.[278]

On the other hand, if the would-be speaker does not fall within the established class, the government's exclusion should be subject only to a rational basis review.[279] The fact that a speaker is located outside of the designated class suggests that government has refrained from viewpoint discrimination, but has excluded the speaker on the basis of the subject matter of the speech in general. This would be a permissible exclusion if there is a legitimate reason to exclude speech of a particular type from the property.[280] With only these two internal standards for exclusions from limited public forum, a problem might arise in the form of the government's deciding to draw the boundaries of the class so narrowly as to exclude all individuals except a select few. This is when an additional "external" standard comes into play. Once a court determines that a speaker falls outside a particular class, it should then examine the government's designation of the class before concluding that the government's exclusion was reasonable.[281] The government's

276. This accords with the teachings of both *Perry* and the Equal Protection cases, which provide that, in a public forum, an Equal Protection claim will be given strict scrutiny review. Carey v. Brown, 47 U.S. 455, 461-62 (1980). If there is no public forum created, however, no fundamental right has been implicated by the selective access, and strict scrutiny review is not available. *See Perry*, 460 U.S. at 810.

277. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

278. *See id.* at 830.

279. This accords with the observation in *Cornelius* that, under limited public forum analysis, property remains a nonpublic forum as to all unspecified uses. Deeper Life Christian Fellowship, Inc. v. Bd. of Educ., 852 F.2d 676, 679-80 (2d Cir. 1998) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

280. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

281. This accords with current public forum doctrine analysis, which has not yet established what level of scrutiny should apply to the government's delineation of the

formulation of the class should be subjected to a rational basis review, asking if government was reasonable in drawing the boundaries of the class as it did. If the boundaries seem reasonable, then the speaker's exclusion should be subject to an independent rational basis review.

## VI. Conclusion

The cases that have attempted to examine the intermediate categories of public fora highlight a great irony of the public forum doctrine. The doctrine's mantra is "location, location, location,"[282] and yet one of the most perplexing problems plaguing the public forum doctrine is a matter of location: where in the typology of public fora should courts locate the designated and limited public fora?

The interpretive problems facing courts today go beyond mere matters of location, however, as the natures of the intermediate categories themselves are anything but certain. Although all courts have generally agreed that some intermediate category exists between the extremes of the traditional and nonpublic fora, they have become fractured as to the identity and qualities of this intermediate category. Further, while most courts have recognized both a designated and a limited public forum, the courts are in utter disagreement as to how the two relate to one another. This relationship is of primary importance to public forum analysis, as the classification of the limited public forum under either the designated or nonpublic forum dictates the standard of review for all property qualifying as a limited public forum.

Separating the limited public forum from both the designated and nonpublic fora and developing its own category will dispel the current confusion surrounding its location. Any property or channel of communication qualifying as a limited public forum should be analyzed using a two-pronged level of analysis. First, the court should determine whether the excluded speaker falls within the class selected by government. If the speaker comes within the parameters of this class, the court should subject the government's restriction to strict scrutiny review. If the speaker fails to come within this class, the court should then determine whether the government's designation of the class was

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acceptable class. *See* Denver Area Telecomms. Consortium, Inc. v. Fed. Communications Comm'n, 578 U.S. 727, 750 (1996) ("Our cases have not yet determined, however, that [the] government's decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny.").

282. *See, e.g.*, Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 932 (2000) ("When the state places restrictions on the content of speech taking place on government property, a court's analysis of the location of the speech, more than any other factor, will determine whether or not the restriction is constitutional. It's not so much what you say, but where you say it that counts.").

itself a reasonable decision. If it was, the court should finally look to whether the speaker's exclusion from the class was reasonable. Although there are as of yet no statistics to test either the Second or Fourth Circuit's two-pronged standard of review, it seems likely that, by combining and employing these two standards, courts would foster a more speech-protective environment. It is only by more clearly delineating the boundaries and natures of the limited public forum in this way that the name "limited public forum" can truly have meaning, proving that there is indeed something in a name.